

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA

Plaintiff,

v.

ARNULFO CURIEL-SOLARZANO

Defendant.

3:11-cr-00026-LRH-WGC

ORDER

Before the court is defendant Arnulfo Curiel-Solarzano's ("Curiel-Solarzano") motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Doc. #22.

### **I. Facts and Procedural History**

On February 9, 2011, Curiel-Solarzano was indicted on a single charge of unlawful reentry by a deported alien in violation of 8 U.S.C. § 1326. On May 24, 2011, Curiel-Solarzano pled guilty to the charge without a plea agreement. He was subsequently sentenced to thirty (30) months imprisonment. Curiel-Solarzano did not appeal his conviction. Thereafter, on June 4, 2012, Curiel-Solarzano, acting *pro se*, filed the present motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Doc. #22.

### **II. Discussion**

Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct a sentence if "the sentence was imposed in violation of the Constitution or laws of the United

1 States, or that the court was without jurisdiction to impose such sentence, or that the sentence was  
2 in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”

3 28 U.S.C. § 2255; 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and  
4 Procedure § 41.3b (5th ed. 2005).

5 The Sixth Amendment to the Constitution provides that criminal defendants “shall enjoy  
6 the right to have the assistance of counsel for his defense.” U.S. Const. Amend. VI. To establish  
7 ineffective assistance of counsel, a petitioner must show that his counsel’s performance was  
8 deficient, and that petitioner was prejudiced as a result of counsel’s deficient performance.  
9 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel’s performance  
10 was deficient, the court must examine counsel’s overall performance, both before and at trial, and  
11 must be highly deferential to the attorney’s judgments.” *Quintero-Barraza*, 78 F.3d at 1348 (citing  
12 *Strickland*, 466 U.S. at 688-89) (internal quotations omitted). Once a petitioner has established that  
13 counsel’s performance was deficient, the petitioner “must then establish that there is a reasonable  
14 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
15 been different. A reasonable probability is a probability sufficient to undermine confidence in the  
16 outcome.” *Id.*

17 In his motion for relief under § 2255, Curiel-Solarzano argues that his counsel was  
18 constitutionally ineffective because at the sentencing hearing his counsel failed to request a two-  
19 point downward departure for stipulating to deportation. *See* Doc. #22.

20 The court has reviewed the documents and pleadings on file in this matter and finds that  
21 Curiel-Solarzano’s argument is without merit. Curiel-Solarzano bases his entire argument that his  
22 counsel was ineffective on an internal memorandum of the United States Attorney’s Office which  
23 allowed federal prosecutors, and only federal prosecutors, to offer a two-point reduction in  
24 exchange for a defendant’s consent to a stipulated administrative departure. Here, the federal  
25 prosecutor did not make such an offer because it is not the practice in the District of Nevada. *See*  
26 Doc. #25. Thus, the court finds that Curiel-Solarzano’s counsel’s “failure” to argue for the

1 downward departure was not constitutionally deficient because counsel had no right to request the  
2 departure as it was not first offered by the United States Attorneys' Office. Accordingly, the court  
3 shall deny Curiel-Solarzano's motion.

4  
5 IT IS THEREFORE ORDERED that defendant's motion to vacate or correct sentence  
6 pursuant to 28 U.S.C. § 2255 (Doc. #22) is DENIED.

7 IT IS SO ORDERED.

8 DATED this 27th day of November, 2012.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE